United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7327

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DORSEY & CO., INC.,

Plaintiff-Appellant,

-against-

BANQUE NATIONAL DE LA REPUBLIC D'HAITI,

Defendant-Appellee.

BRIEF FOR APPELLEE BANQUE NATIONALE DE LA REPUBLIQUE D'HAITI

LUNNEY & CROCCO
Attorneys for Defendant-Appellee
20 Exchange Place
New York, N. Y. 10005

Of Counsel:

J. ROBERT LUNNEY
MICHAEL J. McALLISTER

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Tenzer Greenblatt Fallon & Kaplan
Attorneys for Appellant

INDEX TO BRIEF

Page

Table of Citations

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Preliminary Statement

Defendant-appellee Banque Nationale de la Republique d'Haiti, sued herein as "Banque National de la Republic d'Haiti" ("Banque"), filed a cross notice of appeal from the opinion (3a)* and judgment (18a) of the United States District Court for the Southern District of New York (Weinfeld, J.). Accordingly, Banque submits its counter statement of the issues, the case and the facts and its arguments based thereon.

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*Such references are to the Appendix.

Counter Statement of the Issues

1. Whether Banque was "careless" or "imprudent" under the law of Haiti?

2. Whether Banque's acts caused any damage to plaintiff-appellant Dorsey & Co., Inc. ("Dorsey")?

3. Whether Dorsey's acts preclude it from any recovery from Banque?

4. If Dorsey's acts preclude it from recovery from Banque, should Banque recover the damages it suffered from Dorsey's wrongful attachment?

5. If Dorsey's acts do not prevent recovery, should the proper measure of damages be the loss in value, if any, from the date Banque received the collection items until the date it delivered the items to the Haitian Post Office for return to Dorsey?

Counter Statement of the Case

On or about October 10, 1973, Dorsey filed its complaint in connection with the making of an ex parte order of attachment. The complaint sought $124,000 based on a loss in market value of securities sent by Dorsey to

Banque for collection. The loss resulted from the deterioration in the price of the securities between September 25, 1972 and December 22, 1972.

The answer denied the material allegations of the complaint and raised as an affirmative defense, among others, contributory negligence, and as a counterclaim, its claim for damages resulting from the wrongful attachment.

On February 24, 1975, the action was tried before Hon. Edward Weinfeld, without a jury. At the opening of the trial, the Court denied Dorsey's motion to amend the complaint to increase the damages sought from $124,000 to $365,000.

On March 21, 1975 the Court's Opinion, Findings of Fact and Conclusions of Law were filed (3a-15a), essentially holding that under the law of the Republic of Haiti, Banque was negligent and that Dorsey's acts, even if negligent, were not the "proximate cause" of the loss suffered. (11a-12a) Accordingly, the Court found that Dorsey was entitled to damages:

> "based upon the difference between the value of the securities on the date the Banque received them plus a reasonable time for presentation

> for payment to the drawee and notification of nonpayment, in this instance, October 2, 1972, and their value upon the date they were received, December 22, 1972, when they could have been sold by plaintiff..." (14a)

Dorsey has appealed from that portion of the Opinion dealing with the measure of damages and, as noted, Banque has appealed on the question of liability and the measure of damages employed by the Court.

Counter Statement of the Facts

Dorsey is a stock brokerage firm located in New Orleans, Louisiana. Banque is located in Port-au-Prince, Haiti.

In late March or early April, 1972, George Dorsey, the President of Dorsey, received a telephone call from a Lloyd Whitkind in New York who desired to open an account under the name of his company, Whitkind Realty Company. (81a) Several days later, Whitkind telephoned Robert Vedros, the Secretary-Treasurer of Dorsey, to introduce a Robert Tomarkin, who also wished to purchase stocks through Dorsey in the name of his company, Williams Investors. (64a, 81a-85a)

When asked about Dorsey's investigation into the background of Whitkind Realty and Williams Investors,

George Dorsey gave this response:

> "Q. Did anybody in Dorsey attempt to ever check the bona fides of either Williams Investors and Whitkind Realty?
>
> A. To the best of my knowledge, no."
>
> (Banque's Ex. E in evid. (147a))

Vedros, who was assigned the two accounts by George Dorsey, admitted also that Dorsey did not fulfill the documentary requirements when opening the Whitkind and Tomarkin* accounts. (83a-85a) Neither new account cards nor corporate resolutions were obtained by Dorsey from Whitkind Realty or Williams Investors. (Ibid.)

Over the course of the next four months, Whitkind Realty and Williams Investors entered into a series of transactions similar to the ones in suit. Essentially, several purchase orders for a large block of stocks would be given to Vedros for delivery against payment ("d.v.p.").

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*It should be noted that on September 27, 1974 in Supreme Court, New York County, Tomarkin, whose real name is Roberto Tomarkia, pleaded guilty to grand larceny and coercion and was sentenced to five years imprisonment. The facts underlying the grand larceny arose out of the misuse of the Williams Investors account at the Franklin National Bank in connection with delivery against payment transactions between July 23, 1973 and February 8, 1974. (Banque's Ex. B for id.) (pp. 61-63, Transcript of Trial (Doc. No. 55 Record on Appeal))

After the order to buy was executed, Dorsey would receive the stock certificate, prepare drafts which were appended to the certificates and, through its collection agent, The Hibernia National Bank ("Hibernia Bank"), make delivery to a collection agent in Montreal for the account of a Canadian broker-dealer for the accounts of Whitkind Realty and Williams Investors. (87a-88a) Both Whitkind Realty and Williams Investors had accounts at Massey Lavoie, the broker-dealer, whose collection agent, the Bank of Montreal, would pay the drafts upon receipt. (66a) There were approximately six or seven such transactions consisting of "large blocks of stocks" which took place over the period April through July, 1972. (86a, 90a)

Commencing on August 15, 1972, Tomarkin and Whitkind ordered Dorsey to make the following purchases worth approximately $628,000 on the following dates:

August 15, 1972	-	300 C&R Clothiers
	-	300 C&R Clothiers
	-	400 C&R Clothiers
	-	500 Syntex Corp.
	-	3000 Teleprompter Corp.
August 17, 1972	-	500 C&R Clothiers
	-	500 C&R Clothiers
	-	1000 Teleprompter Corp.
August 21, 1972	-	2000 Teleprompter Corp.

August 22, 1972	-	500 Tokheim Corp.
	-	500 Tokheim Corp.
August 23, 1972	-	200 Tokheim Corp.
	-	500 Tokheim Corp.
	-	500 Tokheim Corp.
August 24, 1972	-	500 C&R Clothiers
August 28, 1972	-	2000 Teleprompter Corp.
Sept. 01, 1972	-	2000 Teleprompter Corp.
	-	2000 Teleprompter Corp.
Sept. 11, 1972	-	300 Tokheim Corp.

(Banque's Ex. A. in evid.* (20a-37a; 93a, 94a))

At the end of September, 1972, Vedros checked with Massey Lavoie to see if it would accept delivery of these certificates. Massey Lavoie told Vedros that they would no longer accept delivery on behalf of Whitkind. No reason was asked for or given. (89a-90a)

Vedros was then instructed by Tomarkin that the certificates were to be delivered to Banque for the account of a Paul Supart & Co. (102a)

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* Ex. A. consists of duplicate copies of Dorsey's confirmations to its customers reflecting the trades in issue except for one purchase of 500 shares of C&R Clothiers.

Tomarkin told Dorsey that Paul Supart:

> "was a friend of [Tomarkin] and he had used him several years previous to that to pick up some transactions for him, and he had effected it through Paul Supart [& Co.]". (103a)

Apparently, Tomarkin mentioned Miami, Florida as the location of Paul Supart & Co. (Ibid.) Vedros did not bother to inquire of Banque as to the existence of Paul Supart & Co. nor was any inquiry made of Paul Supart & Co. to see if they had an account for Tomarkin or Whitkind or, more importantly, if there was "free credit" available for either of those accounts. (104a)

On September 25, the certificates in issue were delivered to the Hibernia Bank, Dorsey's collection agent, for delivery against payment to Banque for the account of Paul Supart & Co. for the accounts of Whitkind and Tomarkin. The Hibernia Bank mailed its collection letters to Banque on the same day. The collection items were received by Banque on or about September 29, 1972. (3a-4a) Judge Weinfeld found that:

> "[T]he evidence upon the trial established that on or about September 30, 1972, a day after the package containing the drafts and certificates arrived at the Banque, Banque sent it to the

> post office at Haiti for return to the Hibernia Bank. However, as the defendant itself acknowledges, 'inexplicably, the Haitian Post Office did not return the package containing the certificates and drafts until on or about December 1, 1972, and then by steamship,' and, as noted, the package was delivered to the Hibernia Bank three weeks later on December 22, 1972." (4a-5a; see also 130a)

As pointed out in Judge Weinfeld's Opinion, during the course of the months of October and November, 1972, Hibernia Bank, Dorsey and Banque communicated by cable and telephone regarding the disappearance of the collection items. (5a-6a)

The Haitian Post Office apparently was uncooperative in any communications directed to it by the United States Post Office. (5a)

In early December, 1972, as a result of the various communications and after receiving duplicate copies of the collection items, Banque finally was able to complete its investigation. The search resulted in the location of the collection items still at the Haitian Post Office. (6a; 129a-134a)

On or about December 1, 1972, the Post Office returned the collection items by steamer. On December 22, 1972,

Hibernia Bank received the collection items. (4a-5a)

Dorsey then communicated with its customers regarding delivery. Tomarkin instructed Dorsey to make delivery to a bank in New York for collection. (110a-112a) The redrafted items were presented for payment in New York in late December, 1972 or early January, 1973 and in late January the items were dishonored by the New York bank. (119a-120a) Finally, in May or June, 1973, Dorsey sold out the Whitkind and Tomarkin Accounts. (53a; 72a) Dorsey never offered any rational reason for its failure to liquidate the securities between December, 1972 and May or June, 1973.

The Law

Dorsey conceded at trial that the law of the Republic of Haiti* shall control. (7a-8a) The provisions of the Haitian Civil Code that apply to the issue of liability, state:

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*The Haitian Civil Code, enacted in 1825, is essentially unchanged and is an almost complete reproduction of the Code Napoleon, or the French Civil Code, of the same period. Bishop & Marchant, A Guide Of The Law of Cuba, The Dominican Republic And Haiti, p. 224 (The Library of Congress 1944).

Article 1168 - Any act by a person which causes prejudice to another, obliges said person through whose fault the prejudice occurs, to repair it.

Article 1169 - Everyone is liable for the prejudice he has caused, not only through his act, but also through his carelessness or imprudence. (8a)

The concepts contained in Articles 1168 and 1169 seem to embody the common law principles by which conduct is determined to be negligent. (8a) Banque also established at trial that the Haitian equivalent of the common law affirmative defense of contributory negligence is contained within these two Articles. (145a)

However, in its characterization of Banque's position regarding contributory negligence, the District Court erred in stating that acts of Dorsey had to be the "proximate cause" of its loss. (9a,11a) Rather, Banque posited, and correctly so, that Dorsey's acts were a substantial contributing factor to the alleged loss suffered by it. Simply, Banque contended throughout that Dorsey's acts were disabling and precluded it from prosecuting the claim against Banque.

Argument

I

BANQUE WAS NEITHER "CARELESS" NOR "IMPRUDENT", NOR DID ITS ACTS CAUSE ANY DAMAGE TO DORSEY

Dorsey sought to prove at trial that it sent properly drawn drafts and collection letters, with instructions, to Banque for collection against stock certificates described above. However, the drafts were not collectable for at least three reasons: (a) Paul Supart was not located in Port-au-Prince, Haiti, but rather, at least in theory, in Miami, Florida (103a,131a); (b) neither the collection letters nor drafts gave the Miami address, nor, in fact, any address of Paul Supart which Banque could use for collection purposes (126a); and (c) most importantly, Paul Supart never existed, as admitted by Vedros.* (115a-117a)

Common sense dictates that, if an act cannot be performed, then the failure to perform such an act cannot

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* As will be discussed more fully below, Vedros learned in late December, 1972 or early January, 1973 that Paul Supart & Co. did not exist. (115a-117a) Dorsey's statement in its Brief that it "did not learn that Supart & Co. did not exist until it took the pre-trial deposition of the Banque" (p.4) should be disregarded.

create a liability on the part of the alleged nonperformer. Here, collection could never have been achieved for the three reasons noted above. Accordingly, Banque cannot be held liable to Dorsey for any damage it may have suffered.

Moreover, Banque promptly returned the collection items. On or about September 30, 1972, Banque's mail clerk mailed the package of collection items at the Haitian Post Office for return to the Hibernia Bank. (130a) This limited activity does not create liability under the Haitian Civil Code. The error, if any, was that of the Haitian Post Office which inexplicably held the package two months before sending it on to the Hibernia Bank. (129a-130a) Accordingly, Banque should not bear any of the loss in value in the securities.

II

IF THE COURT SHOULD FIND BANQUE NEGLIGENT, THE CONTRIBUTORY NEGLIGENCE OF DORSEY PRECLUDES IT FROM RECOVERY OF ANY DAMAGES

Victor Pierre-Louis, Esq., a lawyer admitted to practice in the Republic of Haiti and before its courts, testified as an expert that, under the law of Haiti, if a court finds that both parties have been equally at fault, then the court will dismiss the claim as to both and leave the parties in the

position where it found them. (145a) This testimony was uncontradicted.

This concept is reflected in the common law defense of contributory negligence. To quote an eminent writer:

> "It is perhaps unfortunate that contributory negligence is called negligence at all. 'Contributory fault' would be a more descriptive term. Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty, unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of his own negligence.
>
> * * *
>
> "The same intelligence, attention, knowledge and judgment are required of the actor for the protection of his own interests as for the protection of others, and the same allowance is made for his physical inferiorities, and for the immaturity of children, diverted attention, and the burden of taking precautions." Prosser, The Law of Torts §65 at 418, 419 (4th ed. 1971) (footnotes omitted) (hereinafter cited as "Prosser")

Contributory negligence is not to be explained in terms of "proximate cause" since causation is inappropriate as a method of analysis of this affirmative defense. Rather, a plaintiff's acts should be viewed in light of whether they were a substantial contributing factor to the loss allegedly suffered. See generally Prosser, pp. 416-427.

It is Banque's position that Dorsey's acts contributed substantially to any loss it may have suffered and therefore, disentitles it to any recovery from Banque.

Dorsey's Failure "To Know Its Customers" Substantially Contributed To Any Loss It May Have Suffered.

Vedros admitted that in 1972 Dorsey, a member of the National Association of Securities Dealers, Inc., was required to use due diligence to learn the essential facts of each of its customers. (79a-80a) It was further admitted by Mr. Dorsey that his company failed to learn the "bona fides" of Tomarkin, Whitkind, Williams Investors, Whitkind Realty or Paul Supart. (146a-148a) Vedros also testified that he merely accepted the instructions of Mr. Dorsey to open the accounts and did not verify the only reference given for the Whitkind account. (81a-84a)

This lack of due diligence by Dorsey clearly violated

SEC Rule 15b10-3 (17 CFR 240.15b10-3) which requires every broker to learn all the essential facts regarding its customers. A "callous disregard" of this rule gives rise to a federal claim, subject to proof at trial. See Buttrey v. Merrill Lynch, Pierce, Fenner & Smith Inc., 410 F.2d 135, 143 (7 Cir. 1969), cert. denied, 396 U.S. 838 (1969). If affirmative relief is available under these circumstances, then a stranger to the underlying transactions should be permitted to raise such neglect as a defense against a claim by the delinquent broker. One of the functions of the "know your customer" rule is the protection of the public. Id. at 142 If the broker fails to take the required steps, thus endangering the public, it should not be permitted to recover from a member of the public. Dorsey's "callous disregard" of the "know your customer" rule clearly and substantially contributed to its losses. Accordingly, it should be precluded from recovering any of its loss from Banque, a member of the protected class.

Dorsey's Failure To Supervise Diligently The Accounts Also Contributed Substantially To Any Loss It Suffered.

Dorsey is subject to the rules of the SEC, one of which requires a dealer, such as Dorsey, to supervise diligently

its accounts. SEC Rule 15b10-4 (17 CFR 240.15b10-4)

The Canadian brokerage firm, Massey Lavoie, advised Vedros on or about September 20, 1972 that it refused to do any more business with Whitkind. (89a-90a) Did Vedros pursue this refusal? No, and the reason clearly was the $640,000 debit in the Whitkind and Tomarkin accounts which had to be paid by its customers or Dorsey would suffer the loss. Vedros completely disregarded this "red flag" raised by Massey Lavoie, violated the rule requiring diligent supervision and attempted to deliver the certificates to an unknown agent in Haiti which was "located" in Miami.

There was a complete absence of diligence by Vedros consisting of negligent preparation of documents, including a lack of address for Paul Supart, and a lack of inquiry of Banque or Paul Supart to see if funds were available for payment, or if, indeed, the delivery of certificates would be accepted. Dorsey's failure to supervise diligently the two accounts, especially its failure to act on Massey Lavoie's warning, substantially contributed to Dorsey's loss and it should be precluded from recovering from Banque because of it.

Dorsey's Violation Of Regulation T Makes The Underlying Transactions Unlawful, Thus Prohibiting Recovery From Banque.

Regulation T (Reg. §220.1, et seq. (12 CFR §220.1))

was promulgated by the Federal Reserve Board of Governors for the purpose, among others, of controlling credit extended by a broker to its customers on purchases of stock. Vedros admitted that he was generally familiar with Regulation T and, specifically, the provisions therein which pertained to the types of transactions that Whitkind and Tomarkin were involved in, i.e., d.v.p. (66a, 86a-99a, 104a-109a)

Vedros also admitted that he was familiar with the Board of Governors' Memorandum regarding Regulation T. CCH NASD Manual, ¶ 4015 (95a-96a)

The pertinent provisions of Regulation T are:

> "220.4(c) Special cash account. -- (1) In a special cash account, a creditor may effect for or with any customer bona fide cash transactions in securities in which the creditor may:
>
> (i) Purchase any security for, or sell any security to, any customer, Provided, Funds sufficient for the purpose are already held in the account or the purchase or sale is in reliance upon an agreement accepted by the creditor in good faith that the customer will promptly make full cash payment for the security and that the customer does not contemplate selling the security prior to making such payment.
>
> * * *
>
> "(5) If the creditor, acting in good faith in accordance with subparagraph

(1) of this paragraph, purchases a security for a customer, or sells a security to a customer, with the understanding that he is to deliver the security promptly to the customer, and the full cash payment to be made promptly by the customer is to be made against such delivery, the creditor may at his option treat the transaction as one to which the period applicable under subparagraph (2) of this paragraph is not the 7 days therein specified but 35 days after the date of such purchase or sale.

* * *

"(8) Unless funds sufficient for the purpose are already in the account, no security other than an exempted security shall be purchased for, or sold to, any customer in a special cash account with the creditor if any security other than an exempted security has been purchased by such customer in such an account, and then, for any reason whatever, without having been previously paid for in full by the customer, the security has been sold in the account or delivered out to any broker or dealer during the preceding 90 days....

For the purposes of this subparagraph, the cancellation of a transaction, otherwise than to correct an error, shall be deemed to constitute a sale. The creditor may disregard for the purposes of this subparagraph a sale without prior payment provided full cash payment is received within the period described by subparagraph (2) of this paragraph and the customer has not withdrawn the proceeds of sale on or before the day on which such payment (and also final payment of any check received in that connection) is received. The creditor

> may so disregard a delivery of a security to another broker or dealer provided such delivery was for deposit into a special cash account which the latter broker or dealer maintains for the same customer and in which account there are already sufficient funds to pay for the security so purchased; and for the purpose of determining in that connection the status of a customer's account at another broker or dealer, a creditor may rely upon a written statement which he accepts in good faith from such other broker or dealer.

The Memorandum of the Board of Governors provides in pertinent part:

> "Special cash accounts
>
> The 'Cash Account' (technically termed the 'Special Cash Account'), described in the Regulation is one in which customer transactions are effected with the understanding that they will be settled promptly -- that is, within the two or three days required by use of the usual transmittal facilities.
>
> "Time for payment
>
> On purchase transactions the Regulation further states that, if full payment is not made within seven full business days after the trade date, the broker/dealer shall cancel or otherwise liquidate the transaction or the unsettled portion thereof. There are exceptions to this requirement."

* * *

"Payment on delivery

If a purchase is made by a customer with the understanding that payment is to be made on delivery, the broker/dealer may treat the transaction as one in which the applicable period is not seven full business days but thirty-five calendar days, but the broker/dealer has the obligation to deliver and obtain payment as soon as possible and he may not deliberately delay delivery. Delivery to a bank for the account of a customer is equivalent to delivery to the customer.*

"Frozen accounts

The Regulation provides that if a security is either delivered to another broker/dealer or is sold (cancellation of a transaction otherwise than to correct an error, shall be deemed to constitute a sale before being paid for in full) the account must be frozen for a period of ninety calendar days. Subsequent purchases can be effected only if cash is on hand prior to execution, or if proper authorization, based upon exceptional circumstances, is obtained from the appropriate sources indicated below under 'Extensions of Time.' However, this restriction may be disregarded in the following instances; if, in the case of a sale without prior payment, full payment is, however, received before the expiration of the seven full business days and provided the proceeds of the

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*As will be further discussed infra, Dorsey's main witness, and its Secretary-Treasurer, Robert Vedros, was completely incredible regarding Dorsey's obligations under federal securities' regulations as witnessed by his testimony that the "35 day" rule did not apply to the transactions in suit. (105a-109a)

> sale have not been withdrawn on or before the day on which payment is received; or, in the case of delivery to another broker/dealer, the delivering broker obtains from the receiving broker a written statement that the securities are being accepted for a 'Special Cash Account' of the customer in which there are already sufficient funds to make full cash payment for the securities so received." CCH NASD Manual, ¶ 4015 at pp. 4019-2,3

These provisions clearly apply to the Whitkind and Tomarkin transactions as they were described by Vedros. The transactions were d.v.p. in which there had previously been six or seven transactions through the Bank of Montreal, starting in April, 1972 and reaching into early August. (86a-90a)

According to Vedros, Dorsey did not freeze the accounts nor obtain written statements from Massey Lavoie that there were sufficient funds available in the Whitkind and Tomarkin accounts to make full cash payment. (104a) Under Regulation T, these accounts should have been frozen.

However, Dorsey was generating commissions in a difficult era and to freeze these two accounts would have been abhorrent to Dorsey, especially to Vedros who was receiving a 50% net commission these trades. (78a-79a) Patently,

Vedros was assisting Whitkind and Tomarkin in obtaining a "free ride" -- the customers were selling the stock through Massey Lavoie and paying for the purchase upon delivery by Dorsey. S.E.C. v. Packer, Wilbur & Co., Inc., et al., 498 F.2d 979, 981 (2 Cir. 1974)

As this Court noted, there is nothing intrinsically wrong with "free riding" under Regulation T, but

> "it simply imposes a foreclosure on other credit or delayed-payment transactions if a free-ride or other premature sale has occurred within the preceding 90 days. Once a free-ride has occurred, to allow the customer delayed payment during the ensuing 90 days, whether or not it eventuates in another free-ride, is to violate §220.4(c)(8)." Id. at 983

This Court went on to say that the practice of obtaining a "letter of Free Credit" is optional.

> "But the only effect of failure to obtain such a letter was to bar use of the account for further free-rides during the ensuing 90-day period." Id. at 983

Isolated free rides are permissible, but the practice of such during a 90-day period is prohibited. Here, Dorsey entered into a number of separate and distinct d.v.p. trades with Whitkind and Tomarkin. But never once was the account

frozen nor were letters of Free Credit obtained. In fact, the purchases of the stock in suit took place over a 30-day period without payment by Whitkind and Tomarkin within 35 days. These very trades violated Regulation T's 35-day and 90-day rules.*

As noted above, Vedros represented that the 35-day rule of Regulation T was not violated because of "holidays". (105a-109a) This conflicts clearly with §220.4(c)(7) which provides that "The 35-day period...refer to calendar days". Thus, Vedros, a registered principal of Dorsey, either is grossly incompetent or was seeking to mislead the Court.**

It must be remembered that the initial purchase in suit took place on August 15, 1972. Yet, on or about September 20, 1972, the securities had not been paid for

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*Dorsey's history of violations of NASD Rules and Regulation T (45a-46a) show a pattern of activity that lends credence to the belief that Dorsey would cut corners and breach rules of conduct to make a profit.

**Both Vedros and George Dorsey had successfully covered up their violations during the NASD investigation into the Williams Investors and Whitkind Realty accounts, but the trial of this action clearly showed Dorsey's willing participation in its customers' scheme to use the "free-ride" technique to play the market. See, for example, Dorsey's admission that Whitkind and Tomarkin pleaded the Fifth Amendment during discovery in this case and the NASD findings that Dorsey handled these accounts improperly. (40a-42a, 52-56a and 124a)

and Massey Lavoie advised Vedros that it refused to handle Whitkind's account. Either the stocks had to be sold immediately at a loss* or they had to be "parked" until Whitkind and Tomarkin could find another broker.

The nonexistent accounts at a fictitious Paul Supart were created to answer the dilemma. The stock could be parked in Haiti while the market hopefully turned around and Tomarkin and Whitkind found a friendly broker. Whatever the legality of these machinations, one conclusion stands out -- Dorsey violated Regulation T in at least two ways: (a) it failed to freeze the accounts; and (b) it failed to obtain the letters of Free Credit.

Incidentally, but most importantly in terms of taking necessary precautions, such letters would have served the purpose of determining that Paul Supart did not exist. This failure contributed substantially to whatever loss Dorsey sustained. Simply, Dorsey's flagrant violations of Regulation T should preclude it from recovering any of its losses from Banque.

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*Compare the approximate value of the securities in issue at the time of purchase -- $628,000 (73a) and the approximate value as of September 29, 1972 -- $580,000. (17a)

III

IF THE COURT SHOULD FIND THAT BANQUE WAS NEGLIGENT AND DORSEY WAS NOT CONTRIBUTORILY NEGLIGENT, THE DAMAGES AWARDED SHOULD BE LIMITED TO THOSE FORESEEABLE AT THE TIME OF THE BREACH AND WERE THE IMMEDIATE AND DIRECT CONSEQUENCE OF ACTS OF BANQUE.

As noted above, the Code Napoleon and the Haitian Civil Code are virtually one and the same.

In the Code Napoleon there are three Books, the third of which is entitled "Modes of Acquiring Property". Title III thereof is entitled "Of The Effect of Obligations" and Title IV, "Of Engagements Which are Found Without Contracts". Title III includes Section IV entitled "Of Damages and Interest Resulting from the Non-performance of Obligation". Title IV contains Articles 1168 and 1169 discussed above and which state:

Article 1168 - Any act by a person which causes prejudice to another, obliges said person through whose fault the prejudice occurs, to repair it.

Article 1169 - Everyone is liable for the prejudice he has caused, not only through his act, but also through his carelessness or imprudence.

There are no articles within Title IV of the Code -- Napoleonic or Haitian --- specifically defining the damages to be paid. However, elsewhere in Book III of the Code Napoleon and the Haitian Civil Code, specifically in the Section noted above, there are guidelines regarding damages which, we submit, control any award of damages here:

Article 1149 - The damages and interest due to the creditor are, in general, to the amount of the loss which he has sustained or of the gain of which he has been deprived; saving the exceptions and modifications following.

Article 1150 - The debtor is only bound for the damages and interest which were foreseen or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that obligation has not been executed.

Article 1151 - Even in the case where the nonperformance of the contract results from the fraud of the debtor, the damages and interest must not comprehend, as regards the loss sustained by the creditor and the gain of which he has been deprived, anything which is not the immediate and direct consequence of the nonperformance of the contract.

As can be seen from Articles 1150 and 1151, the damages to be awarded must be foreseeable at the time of the contract. Furthermore, the damages must be the immediate and direct result of the nonperformance of the contract.

Banque should not be liable for any loss in value between the time the Haitian Post Office received the collection items, and any date thereafter. It was not foreseeable that the Haitian Post Office would fail to forward immediately the package to the Hibernia Bank. This failure should not be imputed to Banque. It is exactly on this point that the trial court erred.

If this Court should find, however, that Banque is liable for the acts of the Haitian Post Office, then the damages should be limited only to the loss in value of the stocks from October 2, 1972 to and including December 22, 1972, when Dorsey received the stock back.

Dorsey renewed negotiations with its two customers on or about December 22, 1972 and the problems including lack of payment that arose thereafter were not the result of any acts of Banque, but those of Dorsey. Banque's last contact with Dorsey was Banque's cable of December 19, 1972. Dorsey never responded to the cable and effectively sealed off

Banque from any further responsibility for Dorsey's acts. Thereafter, Dorsey could have sold out their customers' positions at any time and avoided any further consequences. See Prosser, §65 at pp. 422-424. This is required by good business sense and would have avoided further violations of Regulation T. Dorsey's continued negotiations after December 22, 1972 with Whitkind and Tomarkin regarding payment caused any further loss suffered by it. Thus, the maximum period to measure damages must be no greater than that between October 2, 1972 and December 22, 1972.

IV

THERE ARE NO FACTS OR LAW TO JUSTIFY DORSEY'S APPEAL

Dorsey, in this appeal, seeks to obtain a greater recovery than the District Court allowed, which restricted recovery to a loss in value between October 2, 1972 and December 22, 1972. (14a) Dorsey contends here that the recovery should reflect the additional loss in value of the securities in issue between December 22, 1972 and either May, 1973 (72a-74a) or June 29, 1973, the possible dates of sale (53a).*

* Dorsey never established satisfactorily its sale of the securities, as the conflicting dates show.

However, its rationale is based on two misapprehensions, the first is factual and the second is legal.

Dorsey now claims that it didn't learn that Paul Supart didn't exist until the deposition of Banque in January, 1974 (p. 4, Brief on Appeal). But this position is contrary to Vedros' admission at trial that his investigation in late December, 1972 or early January, 1973 showed the nonexistence of Paul Supart. (115a-117a) Moreover, Dorsey attempted collection through another New York bank which in turn rejected delivery some time in January, 1973. (119a-120a) For Dorsey to claim that it wasn't until pretrial discovery in 1974 that it learned its customers were defrauding it, is to say the least, unfounded.

As far as Dorsey's legal analysis regarding damages is concerned, it would make an alchemist blush. Dorsey's use of federal securities fraud cases to demonstrate the law of Haiti regarding the proper measure of damages in a negligence action is beyond comprehension. As this is a diversity case (see 3a), the choice of law regarding damages is controlled by New York law. Rosenthal v. Warren, 475 F.2d 438, 440 (2 Cir. 1973) New York's interest in this case is nil, since neither of the parties is from here, nor did any of

the acts complained of take place here. This is an international case with Louisiana and Haiti as the two jurisdictions having any relevant interest, since the parties are clearly from those places. However, the alleged tortious acts of Banque all took place in Haiti. Moreover, any recovery would result in a removal of funds from that country, which can ill afford the loss of any significant amount of money. Therefore, Haiti's governmental interests are superior to Louisiana's and it is to her laws regarding damages that we must look. Babcock v. Jackson, 12 N.Y.2d 473 (1963) Accordingly, Dorsey's total reliance on federal securities fraud cases is irrelevant to the issue of damages and should be rejected.

V

AS A RESULT OF THE WRONGFUL ATTACHMENT, BANQUE IS ENTITLED TO AN AMOUNT REPRESENTING THE LOSS OF USE OF ITS MONEY FROM OCTOBER, 1973 TO JULY 3, 1975 AND ATTORNEYS' FEES.

On June 20, 1974, the District Court denied Banque's motion to vacate the order of attachment herein made pursuant to New York's CPLR 6213 and 6223 on the ground that Dorsey failed to serve the summons and complaint upon Banque

within 60 days of the issuance of the order of attachment. The Court's decision stated that the mailings of the summons and complaint by the Clerk of the Court, pursuant to F.R.Civ.P. 4(i)(1)(D) had to have been received by Banque since "it is inexplicable..." that the mailings were not received. (Doc. No.17, Record on Appeal) The Court made this finding despite the denial of receipt by Banque. However, this denial becomes persuasive in light of the trial evidence regarding the manner in which the collection items were handled by the Haitian Post Office.

Under CPLR 6223, where the order of attachment is void ab initio, a cause of action for wrongful attachment arises. Here, since service of the summons and complaint was never effected within 60 days of the issuance of the order as required by CPLR 6213, the order must fall and the levy thereunder was wrongful. Accordingly, Banque should be awarded an amount equivalent to the legal rate of interest on $135,000 from October 10, 1973 to July 3, 1975, the date of satisfaction of the judgment herein, plus attorneys' fees involved in Banque's motion to vacate the order of attachment, dated January 24, 1974.

Conclusion

For the reasons stated above, the District Court's judgment should be reversed and the action remanded for proceedings consistent with the proposition that Banque is not liable to Dorsey, but rather Dorsey is liable to Banque for damages resulting from the wrongful attachment herein.

Respectfully submitted,

LUNNEY & CROCCO
Attorneys for Defendant-Appellee
20 Exchange Place
New York, N. Y. 10005
(212) 269-7700

Of Counsel:

J. Robert Lunney
Michael J. McAllister